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No. 83-802

In the Supreme Court of the United States

October Term, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a Subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *Petitioners*,

vs.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an Administrative Agency of the State of Kansas, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does 49 U.S.C. §11503 compel a district court of the United States to grant injunctive protection to a rail transportation property owner based merely on an unproven claim of overvaluation for ad valorem taxation?

PARTIES

The parties to this case are accurately listed in the Petition.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, a copy of which is contained in

Appendix A of the Petition, was filed August 25, 1983, and is reported at 715 F.2d 494. The opinion of the United States District Court for the District of Kansas, a copy of which is contained in Appendix B of the petition, was filed on December 9, 1982, and is unreported. The district court's order denying the preliminary injunction requested by petitioners, a copy of which is contained in Appendix C of the Petition, was dated December 1, 1982, and is unreported.

JURISDICTION

The jurisdictional statement contained in the petition is adequate.

STATUTORY PROVISIONS INVOLVED

Public Law 94-210 of the 94th Congress, 90 Stat. 54 (1976), commonly called the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), was enacted on February 5, 1976. Section 306 of that Act prohibits the assessment by a state for ad valorem tax purposes of rail transportation property at a higher ratio of the assessed value to the true market value of such rail transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property. Section 306 was originally codified at 49 U.S.C. §26c. In October, 1978, §26c was repealed and recodified at 49 U.S.C. §11503.[1]

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[1] Hereinafter referred to as either "49 U.S.C. §11503" or "§11503".

STATEMENT OF THE CASE

The petitioners seek a review of the Tenth Circuit's opinion affirming the order of the district court which had denied a preliminary injunction. In the district court, the petitioners sought a preliminary injunction preventing the respondents from collecting ad valorem taxes based upon valuations which they claimed were excessive.

On July 9, 1982, the eleven interstate Railroads doing business in Kansas commenced two actions in the United States District Court for the District of Kansas. In Case No. 82-1561, the Petitioners here[2] (hereinafter called the "BN Railroads") sued the Kansas Department of Revenue and two of its administrative officers (hereinafter "State") alleging that the State had violated 49 U.S.C. §11503 in two respects: (1) The BN Railroads alleged that the State was assessing rail transportation property at a higher ratio of its true market value than commercial and industrial property's assessed value bore to its true market value (hereinafter called "equalization claim") and (2) the State had valued their rail transportation property at a value which exceeded its true market value (hereinafter called "valuation claim"). In Case No. 82-1562, the remaining five railroads,[3] not parties herein, plead an equalization claim only.

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2. The Appellants herein are listed as the Burlington Northern Railroad Company, Missouri Pacific Railroad Company, The Kansas City Southern Railway Company, The Kansas and Missouri Railway and Terminal Company, Union Pacific Railroad Company and The Missouri-Kansas-Texas Railroad Company. It should be noted that The Kansas and Missouri Railway and Terminal Company did not seek valuation relief at the hearing on the preliminary injunction. Pet.App.B at p. 11a.

3. The five interstate railroads who admitted that the values determined by the State were their true market values were The

(Continued on following page)

In November, 1982, the BN Railroads moved the district court for a preliminary injunction to restrain the State from collecting that portion of the first half ad valorem taxes which they claimed violated 49 U.S.C. §11503. Since the issues in the equalization portion of the actions had been fully tried in a prior tax year and were on appeal to the Tenth Circuit Court of Appeals, the State and the Railroads in both cases stipulated that the equalization relief accorded the Railroads would be in keeping with the methodology used in the prior action.[4] Pursuant to the stipulation, the statutory level of assessment of 30 percent of fair market value was reduced to 11.7 percent, the stipulated level of assessment of commercial and industrial real estate only; the relief accorded under the equalization claim enjoined the State from levying and/or collecting 61 percent of the Railroads' first half ad valorem taxes. The evidentiary hearing on the motion for a preliminary injunction related only to the valuation claim of six of the eleven railroads.

The hearing on the preliminary injunction lasted three days. The BN Railroads relied on a hired consultant for their opinions and estimates of value. The State called as its witnesses the Director of Property Valuation and

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Footnote continued—

Atchison, Topeka & Santa Fe Railway Company, Chicago & Northwestern Transportation Company, Chicago, Rock Island & Pacific Railroad Company, Kansas City Terminal Railway Company, and St. Louis Southwestern Railway Company.

4. The 1980 4-R Case, reported at 552 F.Supp 1031 (1982), involved only an equalization issue since all eleven Railroads in that case admitted their Kansas values were their true market values. The stipulation of the parties in the instant case recognized that appeals had been taken from the final order in the 1980 case (Case Numbers on Appeal 82-1873, 82-1878 and 82-1981), that the district court, if it equalized in 1982, would follow the methodology employed in the 1980 case, and that utilization of such methodology under the stipulation would not prejudice anyone's position in the case on appeal.

two appraisers with the Public Service Bureau of the Department of Revenue.

Both sides agreed that a system value for the Railroads was the proper means of arriving at value and both utilized the same general methodology in arriving at the estimated value. The BN Railroads' appraiser quibbled with some of the factors in the procedures used by the State in arriving at the State's determinations of value. The BN Railroads' appraiser, however, admitted that he had previously testified in the 1980 4-R case before the same court that Kansas followed a particularly consistent approach to value and that the values achieved by the procedures used by the State were reasonable. The witnesses for the State testified that the factors questioned by the BN Railroads had been utilized in Kansas since 1971 and established that the procedures used to value the BN Railroads were identical to those used to value the other five interstate Railroads as well as 230-plus state assessed public utilities.[5] The procedures used to arrive at the estimates of value were described to the court in great detail and the reasons for the increases in value were demonstrated by the State.

The evidence presented at the hearing in the district court included the following:

1. The Burlington Northern admitted that for the 1982 tax year the State of California valued its property at $3,522,747,000, the State of Idaho valued its property at $3,000,000,000, and the State of Oklahoma valued its property at $3,574,921,544, all substantially

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5. Of the six Railroads who challenged their valuations, five of the Railroads' estimates of value increased and one decreased from 1981 to 1982; of the five Railroads who admitted their valuations, all five of the Railroads' estimates of value increased from 1981 to 1982.

higher than the $2,300,000,000 which Kansas determined.

2. The Missouri-Kansas-Texas admitted that for the 1982 tax year the State of Missouri valued its property at $200,000,000, and the State of Oklahoma valued its property at $208,608,050, both substantially higher than the $160,000,000 which Kansas determined.

3. The Missouri Pacific admitted that for the 1982 tax year, the State of Oklahoma valued its property at $1,748,293,455, and the State of Tennessee valued its property at $1,700,000,000, both substantially higher than the $1,550,000,000 which Kansas determined.

4. The Union Pacific admitted that for the 1982 tax year the State of California valued its property at $2,569,000,000, and the State of Montana valued its property at $2,723,190,000, both substantially higher than the $2,300,000,000 which Kansas determined.

5. The Kansas City Southern admitted that its home state of Missouri had valued its property at $175,000,000, which was precisely the same amount which Kansas determined.

After hearing all the evidence, the district court found that the BN Railroads had failed to demonstrate reasonable cause to believe that the State had overvalued the property in question in 1982. The district court also held that Congress, in enacting 49 U.S.C. §11503, did not generally intend for federal courts to become involved in the valuation process. The district court *sua sponte* held that the BN Railroads had failed to demonstrate any retaliation by the State in the 1982 valuations of the Railroads. Finding the BN Railroads' opinion testimony wholly inadequate to sustain their burden of proof, the district court on

December 1, 1982, tersely denied the request for a preliminary injunction on the valuation claim. (Pet.App.C) On December 9, 1982, the district court augmented its December 1 order by filing a detailed memorandum decision. (Pet.App.B) The BN Railroads appealed to the Tenth Circuit Court of Appeals from both the December 1 Order and the December 9 Memorandum.

The Tenth Circuit heard the matter on May 19, 1983, and rendered its decision affirming the district court on August 25, 1983. 715 F.2d 494 (10th Cir. 1983).

On appeal, the Tenth Circuit affirmed the district court's denial of the preliminary injunction, stating that an examination of the record disclosed that the BN Railroads had failed to make a showing of discriminatory overvaluation. After carefully noting it had examined "every item of legislative history cited by the district court and . . . by the parties," the Tenth Circuit declared that the district court's opinion fairly recited the legislative history of Section 306 which "militated" against the position of the BN Railroads. Pet.App.A at 5a. The court of appeals concurred with the district court's finding that equalization, not valuation relief, was the purpose of the legislation. The Tenth Circuit also concluded that nothing in the language of Section 306 or in the legislative history suggested "that Congress intended the railroads to escape the general noninterference rule of [28 U.S.C.] §1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." Pet.App.A at 6a. The Tenth Circuit rejected the notion that Congress intended the federal district courts to sit as state tax assessment boards for railroad property, recognizing that such a rule would impose significant bur-

dens on district courts and would substantially thwart the tax collection process of states and their subdivisions.

The BN Railroads sought a rehearing with a suggestion in banc which was summarily rejected by the Tenth Circuit on October 13, 1983. The Tenth Circuit, however, stayed its mandate until November 14, 1983, so that the BN Railroads could file a petition for writ of certiorari with this Court.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

The petition for writ of certiorari should be denied because this Court is being asked to render an advisory opinion on an issue raised for the first time on appeal in this Court in an action where federal jurisdiction is lacking.

ARGUMENT IN SUPPORT OF REASONS FOR DENYING THE WRIT

1. The Issue Presented for Review by the BN Railroads Is a Request for an Advisory Opinion Because Its Determination Will Have No Effect Upon the Ultimate Outcome of the Action Below.

During the evidentiary hearing on the preliminary injunction in the district court, the BN Railroads represented to the court that: "The proof which the railroads plan to offer at the hearing in this case concerning railroad valuation will be the same proof that will be offered at the trial on the merits." Thus, the district court heard *all* the BN Railroads' evidence on the valuation issue. After hearing all the evidence, the district court found that that evidence failed to show that the State had overvalued the BN Railroads' property in 1982. On appeal, the Tenth Circuit reexamined the evidentiary record and also concluded that the BN Railroads failed to make a showing of overvaluation. The BN Railroads have not requested this Court to review this evidentiary record in any manner or fashion. Since both the district court and the court of appeals based their decisions upon the particular facts contained in that evidentiary record, which are unchallenged herein, it necessarily follows that the determination of the "issue" presented by the BN Railroads would have absolutely no effect upon the outcome of the case.

In their pleadings, the BN Railroads did not allege any impropriety whatsoever in the Kansas appraisal process by which their valuations were determined in 1982; they simply alleged that the valuations were too high. They pleaded their case and presented their evidence in

reliance upon a false and arrogant premise, namely, that, for the purpose of considering the request for a preliminary injunction, the district court was required to accept *their* witness' appraisal opinion of the market value of the Railroads' property. Every allegation in the Railroads' complaint filed in the district court and every statement in their motion for preliminary injunction presupposed the conclusiveness of the valuation numbers proffered by the BN Railroads' own hired appraiser. The BN Railroads asked the district court to grant them preliminary injunctive relief based upon their unilateral allegations of value. The district court heard all the evidence the BN Railroads offered. After hearing this evidence, the district court made a specific finding that that evidence was insufficient to show overvaluation. On appeal, the Tenth Circuit agreed with this finding.

The instant petition does not seek review of the evidentiary findings made by the district court and affirmed by the Tenth Circuit. Once again, the petition presupposes the correctness of the testimony of the BN Railroads' hired appraiser and ignores the totality of the factual record below and the findings of fact by the district court and court of appeals. If this Court grants the writ and entertains the "question" presented by the petition, any opinion rendered by this Court will be advisory only, since the factual findings below remain unchallenged.[6] The decisions below are supported by a substantial factual record. Determination of the theoretical "issue" presented by the BN Railroads will not affect the outcome of this particular case. It cannot support the issuance of a writ of certiorari.

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6. The BN Railroads apparently accept as correct the learned pronouncement of Mr. Justice Holmes in *United States v. Johnston*, 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

2. The "Questions Presented for Review" Are Being Raised for the First Time and Are Inadequate to Provide a Foundation for Issuance of a Writ of Certiorari.

The question presented by the BN Railroads to this Court as the basis for review deals with their burden of proving "purposeful overvaluation of their property . . . and discriminatory intent . . ." in order to secure the protection of a preliminary injunction from alleged overvaluation for ad valorem tax purposes. This question is presented for the first time to this Court, and cannot justify the issuance of a writ of certiorari.

In the trial court, the BN Railroads presented what was a simple valuation case. They claimed Kansas had improperly determined the fair market value of their rail transportation property; they sought a preliminary injunction from alleged overvaluations. They were denied relief on the "valuation" issue.

At the Tenth Circuit, the BN Railroads argued that the district court had erred in failing to apply the "federal standard" of valuation, which they claimed was set forth in 49 U.S.C. §11503. As the State pointed out in its brief below, "(i)f this was the position the Railroads took in the district court, they were entirely successful in concealing this position from the Court and from the defendants."

Now the Questions Presented for Review in the petition for a writ have once again changed; the issues offered this Court were not raised in the courts below. This Court needs no citation to its own decisions which hold that a question raised for the first time in a petition for certiorari to this Court will not justify issuance of the writ.

The BN Railroads' apparent difficulty in crafting the question presented for review to the appellate courts flows

from a basic flaw in this case: it simply is not ripe. The BN Railroads correctly acknowledge in their petition that this appeal is from the denial of a preliminary injunction. (Pet. p.17 n.22) While they claim that this case involves a "clear-cut issue of law that is fundamental to the further conduct of the case", they have yet to articulate the "clear-cut issue" and completely ignore the fact that the issuance of certiorari in this case would have no effect on the further conduct of *this* case.

The BN Railroads seek a ratification from this Court of their interpretation of the 4-R Act. In their haste, they have sought this Court's attention before the issues are fully tried. This haste prevents the BN Railroads from properly crafting issues for review. The failure of the BN Railroads to state proper questions for review consistently is symptomatic of the inappropriate and unripe posture of this case. The "Questions Presented for Review" are being raised for the first time and should not be considered by this Court until and unless the trial court and the Tenth Circuit have had ample opportunity to deal with *these* questions. For this reason, if for none of the others advanced in this Brief in Opposition, certiorari should be denied.

3. The "Issue" Presented by the BN Railroads Presupposes a Congressional Intent to Grant Jurisdiction and a Valid Constitutional Basis for It, Both of Which Are Lacking in This Matter.

A. The Court Below Correctly Found That Congress Did Not Intend to Grant Jurisdiction to Federal Courts to Determine Valuation Questions.

Both the district court and the Tenth Circuit closely examined the legislative history of 49 U.S.C. §11503. Both concluded that in enacting this legislation, Congress did not

intend that the railroads could escape the general noninterference rule of the Tax Anti-Injunction Act, 28 U.S.C. §1341, to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of the railroad property. 715 F.2d at 498. 49 U.S.C. §11503 can only be properly interpreted in the light of the long-standing policy of noninterference by the federal judiciary in state taxation matters.

This Court, in a long line of cases, has emphasized the importance of the policy of noninterference by the federal judiciary in matters of state taxation. In *Dows v. City of Chicago*, 11 Wall. 108 (1871), this Court proclaimed:

> "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Id.* at 110.

More recently, Mr. Justice Brennan reiterated the special reasons underlying the policy of noninterference:

> "The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax ad-

ministration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency." *Perez v. Ledesma*, 401 U.S. 82, 128, at n.17 (1971).

In *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), this Court reaffirmed its commitment to the traditional policy of federal noninterference, noting that the compelling nature of the reasons supporting this policy is underscored by the dependence of state budgets on the receipt of local tax revenue. *See also, Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

The legislative history of §306 clearly indicates that Congress was well aware not only of the general proscription on federal interference with matters of state taxation but also of the complexities of the ad valorem process. *See* Pet.App.B at pp. 24a and 18a respectively. Both the district court and the Tenth Circuit were unwilling to infer that §306 was enacted as a blanket exception to the long-standing policy of noninterference with matters of state taxation. Both courts concluded that Congress would have provided a specific directive had it intended to involve the federal courts in the intricacies of the valuation of interstate railroads. Even if the conclusions of the lower courts were in error as to the intentions of Congress, the fact remains that the district court *did* examine *all* the evidence offered by the BN Railroads at the hearing and found it was insufficient to support their claim of overvaluation. Pet.App.C at p. 32a. Both the district court and the Tenth Circuit concluded that Congress did not in-

tend for 49 U.S.C. §11503 to lift the traditional bar of comity and 28 U.S.C. §1341's jurisdictional ban for every imagined cause of action arising from matters of state taxation. The jurisdictional conclusions of the lower courts were dicta only because they heard the evidence and decided the case on the merits. Determination of the abstract jurisdictional "question" will not cure the insufficiencies in the BN Railroads' evidence or change the result below. As such, this "issue" is insufficient to support the issuance of a writ of certiorari.

B. The "Issue" Presented by the BN Railroads Presupposes a Valid Constitutional Basis for Jurisdiction.

The BN Railroads, in their "Questions Presented for Review" have presumed that the Constitution of the United States provides the authority for a federal district court to determine valuations for ad valorem taxation purposes. Such a presumption rests upon a misperception of the powers of the judiciary.

In their statement of the reasons for granting the writ, the BN Railroads have speculated that unless the federal courts assert jurisdiction over the railroads' valuations, the objectives of the 4-R Act will be "negated". Therefore, they assert that the federal court should: (1) determine the value of the railroads under 49 U.S.C. §11503, (2) compare the courts' values with those determined by the State and (3) substitute the courts' values for those of the State. Although the BN Railroads have articulated meretricious speculation and conjecture to support such an exercise of jurisdiction, they are strangely silent as to the basis upon which that jurisdiction might rest. That silence is due, in part, to the fact that the Constitution of the United States prohibits such a grant of power.

This Court has long recognized that the power of taxation is a power belonging to the legislative branch of government. *Heine v. The Board of Levee Commissioners*, 19 Wall. 655 (1874). While the legislative branch may exercise the power of taxation by establishing administrative agencies and empowering officers to administer the same, the separation of powers doctrine simply prohibits the judiciary from interfering with or substituting their judgment for those of the administrative officers. *State Railroad Tax Cases*, 92 U.S. 575 (1876); *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961). Moreover, Congress, in enacting 49 U.S.C. §11503, lacked the authority to delegate the power of taxation and to empower the judiciary to act in a nonjudicial manner. *Wayman v. Southard*, 10 Wheat. 1 (1825); *Symns v. Graves*, 65 Kan. 628, 70 P. 591 (1902).

Under the guise of "discrimination", the BN Railroads are urging this Court to grant a writ of certiorari to allow review of issues which, if decided in the petitioners' favor, would render 49 U.S.C. §11503 unconstitutional. Such cannot possibly support the issuance of the writ of certiorari.

CONCLUSION

The 4-R Act, 49 U.S.C. §11503, was enacted, in part, to correct discriminatory tax treatment of railroads. Its purpose was not to *absolve* them from ad valorem taxation altogether. The BN Railroads have argued that unless federal courts determine valuations for ad valorem tax purposes the objectives of the Act will be negated. In Kansas, the BN Railroads received an abatement of 61 percent of their 1982 ad valorem tax liability under the equalization claim. Now they seek treatment which would make them preferred taxpayers and would perhaps absolve them from *any* ad valorem tax liability whatsoever. Under the guise of discrimination, they seek a "favored status" under the law. They provide no bases for the relief they seek; they ignore the factual record below which demonstrates that they failed to prove their case by competent evidence. The reasons advanced for granting the writ are speculative and conjectural.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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